Supreme Court of the United States.

No. 19.—October Term, 1901.

John Schrimpscher et al., Plaintiffs in Error, vs. John S. Stockton et al. } In error to the Supreme Court of the State of Kansas.

[January 6, 1902.]

This was an action of ejectment brought in the Court of Common Pleas of Wyandotte County, Kansas, by John Schrimpscher and about forty others, heirs of one Carey Rodgers, deceased, a Wyandotte Indian, against John S. Stockton and ten others, to recover a tract of land which had been allotted to certain Wyandotte Indians under the treaty of 1855.

Answers were filed by three of the defendants, containing general denials of the allegations of the petition, and pleas both of a three-year and a fifteen-year State statute of limitations.

To these answers plaintiffs filed a reply to the effect that the ancestor of the plaintiffs, from whom they derived title by descent, was an incompetent Indian, and classed as such under the treaty between the United States and the Wyandotte tribe of Indians, concluded January 31, 1855, and, as such incompetent, was prohibited from alienating any of the lands in controversy, except only the power to lease the same for the term of two years; that defendants and those under whom they claim were bound by the same prohibition, and could have acquired nothing further than such leasehold interest in the land; that defendants occupied such lands in subordination to the rights of plaintiffs' ancestor, and that no notice had ever been brought home to plaintiffs of an adverse claim by defendants.

A jury having been waived and the case submitted to the court, judgment was rendered for the defendants. An appeal was taken to the Supreme Court of the State, which affirmed the judgment of the lower court. (58 Kan. 758.) Whereupon plaintiffs sued out a writ of error from this court.

Mr. Justice Brown delivered the opinion of the Court.

This case turns upon the proper construction of article XV of a treaty with a number of tribes of Indians, including "certain Wyandottes," concluded February 23, 1867, and proclaimed October 14, 1868. (15 Stat. 513, 517.)

The facts of the case are substantially as follows:

On January 31, 1855, (10 Stat. 1159,) the United States entered into a treaty with the Wyandotte Indians, by the *second* article of which they

ceded to the United States certain lands purchased by them of the Delawares, the object of which cession was that "the said lands shall be subdivided, assigned and reconveyed, by a patent, in fee simple, in the manner hereinafter provided for, to the individuals and members of the Wyandotte Nation, in severalty." By the *third* article, provision was made for a survey of the lands, the appointment of commissioners to divide the lands among the individuals of the tribe, and to make up lists of all the individuals and members of the tribe, "which lists shall exhibit, separately, first, those familes, the heads of which the commissioners, after due inquiry and consideration, shall be satisfied are sufficiently intelligent, competent and prudent to control and manage their affairs and interests, and also all persons without families; second, those families, the heads of which are not competent and proper persons to be entrusted with their shares of the money payable under this agreement; and, third, those who are orphans, idiots or insane." Article *four* provided for the issue of unconditional patents in fee simple to those reported by the commissioners to be competent to be entrusted with the control and management of their affairs and interests; "but to those not so competent, the patents shall contain an express condition that the lands are not to be sold or alienated for a period of five years; and not then, without the express consent of the President of the United States first being obtained," &c.

Margaret C. Cherloe was a Wyandotte Indian of the competent class, and as such she was given, under the treaty of 1855, allotment No. 42, to sixty-four acres of the land originally sued for, and received a patent therefor in fee simple, without restriction as to conveyance. This patent was dated June 1, 1859.

After the issue of such patent, and prior to August 31, 1863, Margaret C. Cherloe died intestate, leaving her grandson, Carey Rodgers, as her only heir at law, and on August 31, 1863, the said Carey Rodgers made a deed in fee simple of the land so inherited to Jesse Cooper and Mary E. Stockton.

Carey Rodgers, being himself a Wyandotte Indian, belonging to the incompetent class by reason of being an orphan, was given allotment No. 278, containing fifty-seven acres, and on September 1, 1859, received a patent for said lands, containing the following condition: "That the said tract shall never be sold or conveyed by the grantee or his heirs without the consent of the Secretary of the Interior for the time being, and with the further and express condition, as specified in the fourth article of the treaty with the Wyandottes of the 31st of January, 1855, that the lands are not to be sold or alienated for a period of five years."

On November 15, 1864, the said Carey Rodgers executed a deed in fee simple of this last-mentioned land to Jesse Cooper and Mary E. Stockton, covenanting that he was seized in fee simple and had good right to sell the same.

On February 25, 1869, by a partition of that date by Jesse Cooper and his wife, and Mary E. Stockton and her husband, there was conveyed to Mary E. Stockton the lands sued for in this action and described in the petition. Defendants took title from her.

The said Carey Rodgers died intestate in December, 1867, at the age of 21.

Immediately after the execution of the deeds from Carey Rodgers to Jesse Cooper and Mary E. Stockton the grantees took possession of all the land described in said deeds under claim of title and ownership by virtue of said deeds; made permanent improvements thereon, and they and their grantees have had and held open, undisturbed and adverse possession of all of said lands, claiming title thereto, paid all taxes, cleared the land of timber, and cultivated the same as tenants.

In the years 1891 and 1892 there was a kind of occupancy of part of the land by persons claiming under the plaintiffs, but that does not seem to have been treated as material.

Carey Rodgers thus become possessed of two tracts of land, one of sixty-four acres as the heir at law of his grandmother, Margaret C. Cherloe, and the other of fifty-seven acres as a personal allotment to himself. As plaintiffs state that a settlement of the case has been made so far as relates to the Cherloe tract, we shall dismiss that tract from our opinion. The deed of Carey Rodgers' own allotment of November 15, 1864, was clearly void, since as to this contract, at least, he was incompetent, and took under a patent which provided that the land should never be sold or conveyed by the grantee or his heirs, without the consent of the Secretary of the Interior. If the case stood upon defendants' rights under this deed alone, there could be no doubt whatever that Rodgers' heirs were entitled to the land.

But on February 3, 1867, another treaty was concluded (proclaimed October 14, 1868) with several tribes of Indians, among which were "certain Wyandottes," (15 Stat. 513,) the fifteenth article of which was as follows:

"ART. 15. All restrictions upon the sales of lands assigned and patented to 'incompetent Wyandottes' under the fourth article of the treaty of one thousand eight hundred and fifty-five, shall be removed after the ratification of this treaty; but no sale of lands heretofore assigned to orphans or incompetents shall be made under decree of any court, or otherwise, for or on account of any claim, judgment, execution or order, or for taxes, until voluntarily sold by the patentee or his heirs, with the approval of the Secretary of Interior; and whereas, many sales of land belonging to this class have heretofore been made contrary to the spirit and intent of the treaty of one thousand eight hundred and fifty-five, it is agreed that a thorough examination and report shall be made under directions of the Secretary of the Interior, in order to ascertain the facts relating to all

such cases, and upon a full examination of such report, and hearing of the parties interested, the said Secretary may confirm the said sales, or require an additional amount to be paid, or declare such sales entirely void, as the very right of the several cases may require."

This article makes the following distinct provisions:

1. It removes all restrictions upon the sales of lands patented to incompetent Wyandottes, which should thereafter be made.

2. It provides that no sales of lands theretofore assigned to incompetents shall be made under any legal proceedings, or for taxes, until voluntarily sold by the patentee or his heirs, with the approval of the Secretary of the Interior.

3. That, as to lands theretofore sold by incompetents in violation of the treaty of 1855, a thorough examination and report shall be made under the directions of the Secretary of the Interior, in order to ascertain the facts relating to such cases, and upon examination of such report and a hearing of the parties, the Secretary may confirm such sales, require an additional amount to be paid, or declare the sales void.

No action was ever taken under the third clause to procure a confirmation by the Secretary of the Interior of the deed by Rodgers of November 15, 1864, so that, at the time the treaty of 1868 was ratified, the possession of the lands was in the defendants or their grantors holding adversely to the heirs of Rodgers, but the title still remained in such heirs by reason of the fact that his deed to Cooper and Stockton was void, and no proceeding had been taken under the third clause of Art. XV to confirm or validate it. But although the treaty of 1855 and the patent to Rodgers had expressly provided that there should be no alienation by the grantee *or his heirs*, the treaty of 1868, which took effect after his death, removed all restrictions upon alienations which should thereafter be made, either by the incompetent grantee Rodgers, or his heirs, who thereafter held an alienable title, and were bound to assert such title within the time specified by the statute of limitations, although no title could be gained by adverse possession so long as the land continued to be inalienable by Rodgers and his heirs. (*McGannon* v. *Straightlege*, 32 Kan. 524; *Sheldon* v. *Donoh.ue*, 40 Kan. 346.)

Their disability terminated with the ratification of the treaty of 1868. The heirs might then have executed a valid deed of the land, and possessing, as they did, an unincumbered title in fee simple, they were chargeable with the same diligence in beginning an action for their recovery as other persons having title to lands; in other words, they were bound to assert their claims within the period limited by law. This they did not do under any view of the statute, (whether the limitation be three or fifteen years,) since it began to run at the date of the treaty, 1868, and the action was not brought until 1894, a period of over twenty years.

Plaintiffs, however, seek to avoid the effect of the statute by insisting, first, that statutes of limitations do not run against Indians; second, that defendants were not in possession under color of title, and therefore the statute is not available to them; third, that no title by limitation could be acquired as against the right of the Secretary of the Interior to investigate and declare the conveyance in question to be void, and hence the statute would not begin to run until after such action by the Secretary.

1. Conceding, but without deciding, that so long as Indians maintain their tribal relations they are not chargeable with laches or failure to assert their claims within the time prescribed by statutes, as to which see *Felix* v. *Patrick*, (145 U. S. 317, 330;) *S. C.*, 36 Fed. Rep. 457, 461; *Swartzel* v. *Rogers*, (3 Kan. 374;) *Blue Jacket* v. *Johnson Co.*, (Ibid. 299;) *Wiley* v. *Keokuk*, (6 Kan. 94;) *Ingraham* v. *Ward*, (56 Kan. 550,) they would lose this immunity when their relations with their tribe were dissolved by accepting allotments of lands in severalty. Now, the very first article of the treaty of 1855 provides: "Art. 1. The Wyandotte Indians having become sufficiently advanced in civilization, and being desirous of becoming citizens, it is hereby agreed and stipulated that their organization and relations with the United States, as an Indian tribe, shall be dissolved and terminated on the ratification of this agreement; except so far as the further and temporary continuance of the same may be necessary in the execution of some of the stipulations herein; and from and after the date of such ratification, the said Wyandotte Indians, and each and every of them, except as hereinafter provided, shall be deemed, and are hereby declared to be citizens of the United States, to all intents and purposes; and shall be entitled to all the rights, privileges and immunities of such, citizens; and shall in all respects be subject to the laws of the United States, and of the Territory of Kansas, in the same manner as other citizens of said territory; and the jurisdiction of the United States, and of said territory shall be extended over the Wyandotte country in the same manner as other parts of said territory." There was an immaterial exception not necessary to be noticed here.

It seems, however, that this provision did not prove entirely satisfactory to some of the Indians, who regretted their emancipation and the loss of the protection of the government, and in the treaty of 1868 there was incorporated in the preamble a recital that "a portion of the Wyandottes, parties to the treaty of 1855, although taking lands in severalty, have sold said lands, and are still poor, and have not been compelled to become citizens, but have remained without clearly recognized organization, while others who did become citizens are unfitted for the responsibilities of citizenship; and . . . have just claims against the government, which will enable the portion of their people herein referred to begin anew a tribal existence;" therefore it was agreed by article *thirteen* that the

United States would set apart for the Wyandottes certain land ceded by the Senecas, in order to provide for these Indians, and would make a register of all who declare their desire to be and remain Indians in a tribal condition, who should thereafter constitute the tribe.

It is sufficient to say of this that it could not apply to Carey Rodgers personally, since he died before the treaty was ratified; and there is no evidence that his heirs ever elected to resume their tribal relations and to become again members of the incompetent class. As Article XV removed all restrictions upon the sale of lands by incompetents, if the heirs of Carey Rodgers took the position that the article did not apply to them, they assumed the burden of proving that fact.

2. Plaintiffs' assertion, that defendants were not in possession under color of title, is untenable. They had taken possession under a deed executed by Rodgers, November 14, 1864, which was valid upon its face, made by one having title to the land, and in which the grantor covenanted that he was seized in fee simple, had good right to sell the same, that it was free from encumbrance, and that he would warrant and defend the title unto the grantees against the claims of all persons. The court finds that the defendants and their grantors acted in good faith in making the purchase of said lands and in taking this deed, by which we understand that they paid a valuable consideration, and had no actual notice of any defect in the title of their grantor. It is true that if the grantees had examined the Rodgers patent they would have discovered the restraint upon his alienation of the land; but it is too much to say that a deed valid upon its face, and taken in good faith for a valuable consideration, without actual notice of the facts, does not give color of title. Color of title was defined by this court in *Wright* v. *Mattison*, (18 How. 50, 56,) "to be that which in appearance is title, but which in reality is no title." Said Mr. Justice Daniel: "The courts have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colorable title; the inquiry with them has been, whether there was an apparent or colorable title, under which an entry or a claim has been made in good faith." See also *Beaver* v. *Taylor*, (1 Wall. 637;) *Cameron* v. *United States*, (148 U. S. 301, 307.) There was no evidence in this case, except from the patent, that the grantees even knew that Rodgers was an Indian, as was the case in *Taylor* v. *Brown*, (5 Dakota, 344,) much less that he belonged to the incompetent class, and they apparently received the deed, as many people do, without a careful examination of the grantor's title. In Kansas possession without paper title seems to be sufficient. (*Gilmore* v. *Norton*, 10 Kan. 491; *Anderson* v. *Burnham*, 52 Kan. 454.)

The cases cited by the plaintiffs in support of their proposition, that the deed from Rodgers did not constitute color of title, are those wherein

there was an element of fraud, or want of good faith, which are expressly negatived by the finding of the court in this case. (*Livingston* v. *Peru Iron Co.*, 9 Wend. 511.)

3. That no title could be acquired against the right of the Secretary to declare the deed void, and hence the statute would not begin to run until after such action by the Secretary of the Interior. The case of *Gibson* v. *Chouteau*, (13 Wall. 92, 99,) is relied upon to sustain this proposition. In that case it was held that the occupation of lands derived from the United States under a new Madrid certificate, before the issue of a patent, for the period prescribed by the State statute of limitations, was not a bar to an action in ejectment for the possession of such lands, founded upon the legal title subsequently conveyed by the patent; nor did such occupation constitute a sufficient equity in favor of the occupant to control the legal title thus subsequently conveyed. Obviously this case has no application to the one under consideration. Here the United States had issued a patent to Rodgers "and to his heirs and assigns forever," subject to a condition, not that the title should ever revert to the United States, but that he should not alienate the lands without the consent of the Secretary of the Interior. The government thus passed all its title to the land in fee simple, and a violation of the condition of the patent would not redound to the benefit of the United States, or enable it to repossess the lands, but was simply intended to protect the grantee himself against his own improvident acts, and to declare that the title should remain in him, notwithstanding any alienation that he might make.

We have considered all the points taken by the plaintiffs, and are of the opinion that they are not sustained; that the judgment of the Supreme Court of Kansas was right, and it is therefore

Affirmed.

Mr. Justice WHITE and Mr. Justice MCKENNA dissented.

True copy.

Test:

Clerk Supreme Court, U. S.

END OF CASE

In the case of *Davidson* v. *New Orleans, etc.*, 96 U. S. 97, we find the following statement:

"Whenever, by the laws of the state or by state authority, a tax, assessment, servitude or other burden is imposed upon property for public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings can not be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

This declaration we find repeated by the same court in the cases of

Fallbrook Irrigation District v. *Bradley*, 164 U. S., at page 157.

Bauman v. *Ross*, 167 U. S. 548.

If a Tax Can Be Collected ONLY *by Suit in Court, Notice and Opportunity to Contest Them Sufficient.*

In *Walston* v. *Nevin*, 128 U. S. 578, a Kentucky statute providing for special assessments upon property for the improvement of streets was held valid, because such assessments were made collectible *only* through a proceeding in court, of which due notice was required to be given, and there the party had a right to contest the validity of the assessment.

In accordance with these principles, it has been held repeatedly by the supreme court of the state of Minnesota that the law of that state providing for the assessment and collection of omitted taxes upon real estate is a valid law, because it provides for such collection *only* by a regular proceeding in court, in which due statutory

notice must be given, with an opportunity to the tax-payer to make any just defense to the assessment and tax.

State v. *Weyerhauser*, 75 N. W. Rep. 718.
In re Taxes for Itasca County, 71 N. W. Rep. 265.
State v. *Certain Lands*, 42 N. W. 473.

And the same rule has been declared, and these and similar decisions of that court have been upheld by the supreme court of the United States for the very same reason.

Winona, etc., Co. v. *Minnesota*, 159 U. S. 526.
Hagar v. *Reclamation Dist.*, 111 U. S. 701-711.

But it is said this is a proceeding for the collection of the alleged taxes by a proceeding in court provided for by law, and, therefore, it is within the principles announced by the Supreme Court of the United States and state supreme court above cited. There would be plausibility in this contention, if it were provided that these taxes could be collected in no other way except by this proceeding, or possibly if it were left to stand upon the implication that they could be collected in no other way. But unfortunately for the argument of the attorney-general, such is not the fact.

As we have seen, section 8589, being section 171 of the act of which section 8587 is section 169, expressly and in so many words provides that nothing in the act "contained shall prevent the county treasurer from levying upon and selling the property of the estate of any decedent, or any ward or person whose property is held in trust by another, for the payment of any delinquent taxes in the same manner as other property is sold to pay delinquent taxes, and the remedy given to the county

treasurers by the provisions of this act shall be regarded only as cumulative, etc."

In short, this assessment having been made and the tax extended, by the express terms of this statute, the county treasurer was authorized to proceed to levy upon and sell property for its payment, precisely as he would do in case of any ordinary delinquent tax.

Suppose he had levied on property of the estate and was about to sell the same, where is any remedy provided for the tax-payer? Where does he have an opportunity to be heard in court? Of course, the statute, not providing therefor, no one would contend that by a proceeding by injunction he could have "due process of law." Nowhere is it held, though it is suggested in the opinion in the case at bar (Tr., p. 40), that because a citizen has a right to go into a court of chancery for an injunction, the necessity for notice is obviated. And even if he did go into a court of chancery, he would be making a collateral attack upon an assessment, and would be subject to all the disabilities that attend such an attack.

A construction of the statute which should hold that due process of law is provided because, if the treasurer chooses, he may go into court to collect the assessment instead of making a levy and sale, is to put the tax-payer at the mercy of the treasurer, is to make the validity of the statute rest on the election between remedies by the officer, is to make the rights of the tax-payer depend upon the will of the treasurer, and not upon the law of the land. No court, unless it be the supreme court of Indiana in this case, has ever held—we think no other court will hold—that a statute simply giving to the treasurer a cumulative *right* (not imposing a duty) to go into a court for collection of a tax, in which proceeding notice may be

required, meets the requirements of the law as laid down by this court.

But we are not without authority directly upon this question.

In *Scott* v. *City of Toledo*, 36 Fed. Rep. 385, on pages 396 to 402, the late Mr. Justice Jackson, of the Supreme Court of the United States, then circuit judge, discusses this question and holds that where, as here, the statute gives to the authorities an election to collect an assessment made without notice, either by a proceeding in court or summarily by levy and sale, the statute is invalid, as not affording due process of law, and the assessment so made without notice can not be enforced. This was a question relating to a special assessment, but as he shows in the opinion the rule is precisely the same as in relation to ordinary taxes. In the course of the discussion, on page 400, the learned judge says:

"This brings us to the remaining question in the case, viz., in what way, or by what methods, may an assessment like the present be enforced under the statutes of Ohio? Three ways are provided for its collection: First, the amount assessed, with interest, and a penalty of 5 per cent., may be recovered by suit against the owners of the property assessed, before a justice of the peace or other court of competent jurisdiction (section 2288), which, of course, requires notice to the party sued; secondly, by proceedings, in certain designated courts, to enforce the lien, when the owner of the land assessed is a non-resident, which requires notice by publication (section 2288); or, thirdly, the common council may certify any unpaid assessment to the auditor of the county in which the corporation is situated, and the amount so certified is to be placed upon the tax-list, with 10 per cent. penalty, and to be collected with, and in the same manner as, state and county taxes (section 2295), which are collected either by suit, by forfeiture and sale of the land, or by distraint of sufficient goods and chattels belonging to the person charged with such taxes or assessments.

"In the first two methods of collection to which the common council could or might resort, the notice provided for, or required, would constitute 'due process of law' under the authorities above cited; but if, instead of resorting to these methods of collection, the corporation selected, as it might, the third remedy for the enforcement of the assessment, then the owners would be deprived of any opportunity to be heard in regard to the assessment, either as to its validity or amount, and this would violate the requirements of 'due process of law.' In this respect the present case is distinguishable from that of *Hager* v. *Reclamation Dist.*, 111 U. S. 711, and other like cases, relied upon by counsel for defendant, in which the assessment complained of was enforceable only by legal proceedings, in which any defense going either to the validity or amount could be pleaded. The common council of Toledo having made the assessment in question without notice to, or an opportunity for hearing by, complainants, and having the right to enforce its collection by distraining and selling their property, without resorting to any suit which would give them an opportunity to interpose any defense either to the validity or amount of said assessment, its action in the premises, even if authorized by the statutes of Ohio, is wanting in that 'due process of law' required by the federal constitution before depriving the citizen of his property.

"In its material facts, and the principles involved, the present can not be distinguished from the well-considered case of *Stuart* v. *Palmer*, 74 N. Y. 183, which received the express approval of Mr. Justice Field in the *Railroad Tax Case*, 13 Fed. Rep. 753, and was recognized by the supreme court as a correct exposition and application of the constitutional provision relating to the taking of private property under the form of assessment 'without due process of law,' in the case of *Spencer* v. *Merchant*, 125 U. S. 351-358. The opinion of Mr. Justice Earl, in *Stuart* v. *Palmer*, might well be quoted in full, because of its force, clearness, and direct application to the case now under consideration."

Again, in *Meyers* v. *Shields, County Treasurer*, 61 Fed. Rep. 713, the United States circuit court for the northern

district of Ohio had this question under consideration, and it was expressly held that proceedings by a county auditor under the revised statutes of Ohio, section 2781, by which an assessment for taxes of years preceding the current year is entered on the general tax duplicate against the tax-payer without notice or opportunity to be heard, which assessment is a cloud on the title to his realty, and a lien on his property enforceable by distraint and sale of goods without suit in court, deprive him of his property without due process of law, and are invalid under the fourteenth amendment to the constitution of the United States.

That case is exactly in point here. The facts are practically identical. That was the case of an auditor's assessment for omitted property in the past. In that case the treasurer had an election to collect by distraint and sale, or, as is said by the court on page 723, "if the treasurer fails to distrain goods, he may, under section 1097, apply to the clerk of the court of common pleas in his county; and said clerk shall cause notice to be given to the tax-payer, requiring him forthwith to show cause why he should not pay such taxes; and, if he fails to show a sufficient cause, the court, at the term to which said notice is returnable, shall enter a rule against him for the payment of such taxes and the cost of such proceeding, which rule shall have the same force and effect as a judgment at law, and be enforced by attachment or execution or such process as the court directs."

In speaking of the process of assessment, the court says:

"It is not a satisfactory or sufficient answer to the objections urged against the arbitrary action of the auditor to say that his proceedings are only preliminary, and that in a suit brought to enforce the collection of such taxes the tax-payer has his notice and his opportunity for presenting his defense. The proceeding is not of this inno-

cent character. The statute vests in the auditor the power to proceed in a quasi-judicial character. He summons the parties accused and witnesses, he administers oaths, hears the testimony, and then proceeds to a finding, which has far more vitality and efficiency than the judgment of a court, because more summary remedies are provided for enforcing the collection of the assessment which he makes. Without stating the facts upon which his conclusion is based, or the reasons which lead him thereto, he adds to the tax duplicate an assessment, according to the averments of the bill in this case, of $184,108.50. He certifies this supplemental duplicate to the treasurer, and it thereby becomes a lien upon the taxpayer's property, and a blot upon his character and repatation as a truthful and law-abiding citizen."

On page 724 the court says:

"By the same principle, I conclude that it is not 'due process of law' to enter on the tax duplicate, without notice or trial, what amounts in legal effect to a judgment against the tax-payer, enforceable by distraint and sale of his goods and chattels, and afterwards make it 'due process,' because it may become possible for the taxpayer to interpose a defense, provided the collecting officer elects to bring a suit to enforce the collection when the more summary remedies have proven unavailing. This same principle is admirably stated by Mr. Justice Field in the *Railroad Tax Cases*, 13 Fed. 752, when he says:

"'But whatever the character of the proceedings, whether judicial or administrative, summary or protracted, and whether it takes property directly or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of due process of law. Nothing is more clearly established, by a weight of authority absolutely overwhelming, than that notice and opportunity to be heard are indispensable to the validity of the proceeding. It has sometimes been intimated that a citizen is not de-

prived of his property, within the meaning of this constitutional provision, by the imposition of an assessment. It might as well be said that he is not deprived of his property by a judgment entered against him. A judgment does not take property until it is enforced, and then it takes the real or personal property of the debtor. So an assessment may generally be enforced not only against the real estate upon which it is a lien, but, as in this case, against the personal property of the owner also; and by it he may just as much be deprived of his property, and in the same sense, as the judgment debtor is deprived of his by the judgment.' "

It was accordingly held by Judge Ricks that the assessment was void, because by the law there was fastened upon the property of the tax-payer an assessment which the treasurer was at liberty to enforce by distraint and sale, (although he might collect by suit in court), and, therefore, without any opportunity on the part of the tax-payer to contest the same.

Nor will it do to say that in this particular case the attempt is to collect by a proceeding in court. We are not discussing now the proceedings of the treasurer, but the character of the law under which the assessment was made and under which the collection was to be made. That statute could not be valid and constitutional, or invalid and unconstitutional, at the election of the treasurer. It is absurd to say that if the treasurer elects to collect by proceeding in court, the statute providing for the assessment without notice is valid, but, if he elects to proceed by distraint and sale, it is invalid. The constitutional validity of a statute is not thus to be determined by the whim or election of a county treasurer or other administrative officer.

3. Grounds of Decision by Court Below Indefensible.

But in the opinion of the supreme court of Indiana (Transcript, page 39, bottom, and 40) we find the following:

"A sufficient answer to this is that appellant was an official resident of Marion county at the time the proceeding by the auditor was begun, and therefore within the express terms of this section. He was in a situation to avail himself of all the rights and privileges he asserts are unjustly denied to non-residents, and, while himself not aggrieved, he will not be permitted to assail a revenue statute on behalf of others who are making no complaint. The courts are open to those only who are injured. *Gustavel* v. *State*, at this term; *Pittsburg, etc., Co.* v. *Montgomery*, 49 N. E. 582, 587; *Currier* v. *Elliott*, 141 Ind. 394, 407. Conceding all that appellant affirms concerning his residence, and the absence of any provisions in section 8560 for service of notice on non-residents, still he is not in a situation to complain that he has had no day in court. The assessment by the auditor, right or wrong, was not a final judgment. It was only *prima facie* correct. The courts were open to appellant, even though a non-resident, to challenge it by injunction. Failing to thus seek relief against it, the treasurer appealed to the circuit court for an order against him to show cause why he did not pay the taxes. The jurisdiction of the circuit court over its executor will not be controverted, even though his personal residence is in New Hampshire. He was ordered by the court to show cause, if he had any, why he did not pay the taxes. In response to the order, any defense he had or ever had was open to him.

"It is no longer an open question in this state that if a party against whose property an assessment has been made is at any time in the course of the proceeding before a conclusive judgment afforded by law an opportunity to contest its correctness, he is accorded due process of law within the meaning of the fourteenth amendment.

"*Ganni* v. *Danniman*, 114 Ind. 429.

"*Johnson* v. *Lewis,* 115 Ind. 490.
"*Kiser* v. *Winchester,* 141 Ind. 694.
"*Edwards* v. *The State,* 143 Ind. 84.
"See also *Davidson* v. *New Orleans,* 96 U. S. 97.
"*Hager* v. *Rec. Dist.,* 111 U. S. —, Col.

"Moreover, the right to tax property is a sovereign right, reserved to the jurisdiction charged with the duty of its protection, and the authority of a taxing district to require all classes of property sheltered by it to pay its ratable proportion of the expenses of maintaining the government is unaffected by the residence of the owner.

"The legislature has plenary powers to create a tax for public revenue against all property located in the state, and to provide the procedure for its levy and collection. This had been done by public laws, of which all persons, residents and non-residents alike, must take notice and conform thereto without special summons. The state can not be deprived of the tax because the owner is a resident of another state.

"*Buck* v. *Miller,* 147 Ind. 586, 596.
"*Board of Com.* v. *Reeves,* 146 Ind. 467, 476.
"*Chicago, etc.,* v. *John,* 150 Ind. 113.
"*Graham* v. *Russell,* 152 Ind. 166, 52 N. E. 506."

As to the first sentence of this quotation relating to "official residence," we express our views fully elsewhere in this brief. As to the remainder of the quotation we beg to say that it seems to us to be full of error and false assumptions as to the law.

First. It is asserted that plaintiff in error was not aggrieved because he was in a situation to assert all his rights, even though a non-resident, and it is further assumed that an assessment against plaintiff in error, under a statute providing for no notice, can not be contested in a suit to collect the same, because he might have had it declared void by an injunction. We submit that neither of these two propositions, namely, that the executor is

not aggrieved, nor that he can not defend in this suit on the ground of lack of provision for notice in the law because he might have attacked the assessment collaterally by injunction, will stand the test of argument or authority for a moment. The first assertion must be bottomed upon the contention that, inasmuch as the executor had notice in fact, although the law provided for no notice, he therefore had his day in court and his opportunity to defend. As we have already seen, this contention is directly in the teeth of repeated adjudications by the supreme court of Indiana in cases which that court in this case simply ignored, because there was no way to meet them.

Exactly the same situation existed in *Kuntz* v. *Sumption*, 117 Ind., page 1, where it is shown in the very first paragraph of the opinion that the tax-payer "was subpœnaed before the board and testified as a witness, but did so under protest." He, according to this opinion, was in a condition to assert all his rights, yet the supreme court of Indiana held that the assessment as to him was void for want of notice, because the law provided for no notice.

So in *Eaton, Treasurer*, v. *The Union County National Bank*, 141 Ind. 159, precisely the same situation existed. There was notice in fact, but no notice in law, and it was held there that the assessment was void. If, in the language of the opinion in this case, the tax-payer "was in a situation to avail himself of all his privileges and rights," upon what ground were those assessments void?

And so we might particularize with reference to every case cited by us upon this question, wherein it is held that notice in fact, where there is no provision for notice in law, is no notice at all.

The learned judge writing this opinion cites, in sup-

port of his position touching this point, *Gustavel* v. *State*, 54 N. E. 123, in which it is held that the constitutionality of one section of an act can not be raised in a prosecution under some other section, not in any way related to it; *Pittsburg, etc.*, v. *Montgomery*, 49 N. E. 582, in which it is held that, in an action against a railroad company for damages under the employers' liability act of Indiana, the railroad company can not avail itself of the fact that the act is unconstitutional as to some other corporations; and *Currier* v. *Elliott*, 141 Ind. 394, 407, containing the general declaration that a party who seeks to overthrow a statute must affirmatively establish that the same impairs his rights and is prejudicial thereto. It is not doubted that the law is correctly declared in each of those cases. But what bearing either of them has upon the question under discussion, in which a non-resident tax-payer is contesting the validity of a statute under which his property has been assessed, under a statute providing for no notice to him, is not apparent.

But the learned judge says that this executor might have contested this assessment for want of notice, by injunction, and therefore he can not contest it for want of notice in this direct proceeding to collect. Here again we think has been discovered a doctrine entirely original, and one which might well be copyrighted. It is familiar doctrine that a party who has a direct remedy by appeal, or a right to defend against an action brought to collect a debt or a tax, may not ignore those remedies which the law gives him and go into a court of equity by injunction, and collaterally make his defense. But we think this is the first time it has been held or intimated by any court of last resort that the converse of this proposition is true, that where the law provides for a direct proceeding to collect a tax in court, the tax-payer is precluded from showing that the assessment and levy is void, in that

direct proceeding, because he might have attacked the same by injunction. Of course, no decisions are or can be cited in support of any such doctrine, and its announcement in the case is simply an evidence of the stress of the situation, if this tax was to be upheld.

As we have seen, section 8587 provides for the collection of a delinquent tax by a proceeding in court as in this case. Section 8589 provides, however, that such proceeding shall not prevent the county treasurer from collecting the same by a levy and sale of the property. In other words, it makes the remedy by proceeding in court cumulative only. The language of the opinion as above quoted amounts to a declaration that, notwithstanding there is no provision for notice of the making of the assessment, yet if the treasurer elects to collect by suit in court, the assessment, notwithstanding the want of notice, will be treated as valid, and will be enforced; whereas, if the property owner has commenced a suit to have the assessment declared void and the collection enjoined, the assessment made without notice will be invalid. In other words, in the attempt to avoid the tax by a collateral proceeding, it will be treated as void, while as against the same attempt in a direct proceeding, it will be regarded as valid; notwithstanding that, as in the case at bar, the treasurer, in direct violation of the statute which authorizes only an action "at the next term of court," commenced the suit to collect on the very day succeeding the making of the assessment, and before the tax-payer has had an opportunity, even with the utmost diligence, to file a suit for an injunction.

If this be the law, it is because the highest court of the state has said so, not because it is in accordance with any principle, or sanctioned by any text-writer or other court.

Near the end of the above quotation from the opinion, it is said that the right to tax property is a sovereign

right; that "the legislature has plenary powers to create a tax for public revenue against all property located in the state, and to provide for the procedure for its levy and collection, and that this had been done by public laws of which all persons, resident and non-resident, must take notice and conform thereto without special summons. The state can not be deprived of the tax because the owner is a resident of another state," citing a number of authorities.

No one questions the power of the legislature to tax all property within the state. No one questions that it is its right and its duty so to do. No one questions that residents and non-residents alike must take notice and conform to public laws. But we do deny that taxes can be assessed or collected in the absence of statutes, and heretofore no court has ever asserted that a special assessment of this kind, made after and as a modification of the regular assessment made by public law, can be made without notice. Not only has no court ever decided this, but the supreme court of Indiana time and again has decided exactly the contrary.

On page 8 of 117 Indiana, in the case of *Kuntz* v. *Sumption*, that court has said:

"The tax-payer who has a complaint to make occupies a position very similar to that of the plaintiff in an ordinary action, while the person whose taxes are to be increased is in a position very like that of a defendant. We must hold that such a tax-payer is entitled to notice, or else we must hold that he is bound, at his peril, to keep vigilant watch of the proceedings, lest property he does not own be assessed to him, or the valuation of his listed property be increased. In the absence of notice to him as an individual, he is not bound to exercise any such vigilance. *Claybaugh* v. *Baltimore, etc., R. W. Co.*, 108 Ind. 262; *Munson* v. *Blake*, 101 Ind. 78."

The opinion in *Kuntz* v. *Sumption*, from beginning to end, asserts a doctrine directly at variance with the opinion of the supreme court of Indiana in this case. The same court, over and over again, has endorsed and reaffirmed the opinion in the case of *Kuntz* v. *Sumption*.

The legislature of Indiana, recognizing the correctness of the doctrine there announced, amended the law after that decision was made so as to require notice in such cases; and we venture the assertion that, outside of the opinion in this case, nothing in conflict with the doctrine there asserted can be found either in text-book or report.

As to the assertion in the opinion that the jurisdiction of the circuit court over its executor will not be controverted, even though his personal residence is in New Hampshire, we beg to say such jurisdiction is disputed, except after the executor has been brought into court and required to answer as provided by law.

Scott v. *Dailey*, 89 Ind. 477, is exactly in point upon this question. In that case it is held that the probate court can get no jurisdiction to try any claim against an estate until the matter has been placed upon the docket in accordance with the statute and has remained there for the time prescribed by the statute.

II.

Statute Section 8560 Invalid as Class Legislation and Denial of Equal Privileges and Immunities.

But this assessment is also in violation of section 2, article 4, of the constitution of the United States, that "citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states;" and also of the other provisions of the fourteenth amendment of the federal constitution which forbid any "state to make or enforce any law which shall abridge the privi-

leges or immunities of citizens of the United States," or "to deny to any person within its jurisdiction the equal protection of the laws."

This section, 8560, of the tax law, in providing that, before any resident of the county shall be saddled with a new, extraordinary assessment, he shall have notice and an opportunity to be heard in opposition thereto, but providing for no notice whatever to non-residents of the state and county, is, as it seems to us, a discrimination clearly violative of the above provisions of the federal constitution.

It denies to the citizens of other states, owning property in a given county in Indiana, a privilege and an immunity granted to a citizen of the state resident in that county, in violation of section 2 of article 4 of the federal constitution.

It denies to a non-resident person owning property within a given county in the state the equal protection of the laws, in that it does not give to him the same notice and opportunity to be heard touching the assessment of his property for taxation as is given to a resident of the county, in violation of the fourteenth amendment to the federal constitution.

A few decisions by the state and federal courts make the invalidity of this statute upon these grounds apparent.

A statute of Florida required that before any company, association, firm or individual, not of that state, should transact any business of insurance in that state, it or he should be possessed of at least one hundred and fifty thousand dollars in value, invested in United States or state bonds, or other bankable, interest-bearing stock issued in the United States, at their market value; but such requirement was not made as to domestic unincorporated associations, firms or individuals. The act was

held by the supreme court of Florida to be void, as in violation of section 2, article 4, of the constitution of the United States.

State, ex rel., v. *The Board*, 20 South. 772.

Quoting from *Paul* v. *Virginia*, 8 Wall. 168, the Florida court said:

"It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other states. It inhibits discriminating legislation against them by other states. It gives them the right of free ingress into other states, and egress from them. It insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property, and in the pursuit of happiness; and it secures to them in other states the equal protection of their laws."

A statute of Vermont attempted to give to residents of that state the right to deduct debts from their assets in making their returns for taxation, denying the same right to non-residents. This statute was held by the supreme court of Vermont, in a very elaborate opinion, to be in violation of section 2 of article 4 of the constitution of the United States. Many authorities are cited and the subject is discussed at length in the opinion.

Sprague v. *Fletcher*, 37 Atl. 239.

A statute of Michigan attempted to give certain classes of creditors a right to sue and to have their process served in counties where other classes could not have such service of process. This was held to be invalid as class legislation.

O'Connell v. *Menominee, etc.*, 71 N. W. Rep. 449.

But without further citations, it is sufficient to call attention to a very early decision of a federal court, defining what are the privileges and immunities guaranteed by the federal constitution, and the re-affirmance of that declaration by the supreme court of the United States in a very late volume of its published reports.

In the case of *Corfield* v. *Coryell*, 4 Wash. C. C. Rep., on page 380, Mr. Justice Washington, speaking of these privileges and immunities, says:

"The inquiry is, What are the privileges and immunities of citizens of the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for the purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental."

In *Blake* v. *McClung*, 172 U. S., at page 239, a statute of Tennessee was under consideration. That statute provided that a foreign corporation might do business within the state of Tennessee, but it further provided that—

"Creditors who may be residents of this state shall have a priority in the distribution of assets, or subjection of the same, or any part thereof, to the payment of debts over all simple contract creditors, being residents of any other country or countries, and also over mortgage or judgment creditors, for all debts, engagements and contracts which were made or owing by the said corporations previous to the filing and registration of such valid mortgages, or the rendition of such valid judgments."

As against natural persons, creditors of this corporation who were citizens of other states, this statute was held to be unconstitutional and void. In the course of the opinion, the above quotation from the opinion of Mr. Justice Washington is recited and approved, and numerous other decisions are reviewed.

We call especial attention to that part of the opinion of Mr. Justice Washington wherein he says that among the privileges and immunities so guaranteed are "an exemption from higher taxes or impositions than are paid by the other citizens of the state." If this guarantee is against higher taxes or impositions, in order to make the same available, it must also be a guarantee to the non-resident citizen of equal facilities in defending himself and his property against unequal taxation or higher assessments. Otherwise the guarantee against higher impositions amounts to nothing.

Of course, it would not be difficult to multiply the citation of authorities against class legislation and improper discrimination among tax-payers. But the citations which have already been made are deemed to be more than sufficient.

III.

"Official Residence" a Legal Fiction.

But, as before stated, and as the opinion of that court shows, the invalidity of this statute as against a non-resident is recognized by the supreme court of Indiana. It is practically admitted that the statute failing to provide for notice to any one except a resident of the county does not provide due process of law. The supreme court of Indiana, however, for the purpose of sustaining this tax, makes a discovery of a legal fiction in the term "official residence," as bald as was ever sanctioned in common law administration, and resting this assessment upon this legal (or illegal) fiction, sustains the assessment. Let us examine this question of "official residence" and see whether it has any justification either in fact or law.

And we premise by saying that neither in the briefs of counsel below nor in the opinion of the supreme court of Indiana is reference made to any text-book or decided case suggesting such a thing as an "official residence." The idea is purely original, a novel and, barring the question of utility, a patentable invention. And the learned judge who wrote the opinion for the supreme court, rejoicing in his discovery, carries it so far as to make our client not only a resident of Marion county, but "*officially resident in the Marion circuit court.*" (Page 39.) Residence in a court is good, but even this is not enough in this case. The learned judge should have declared our client to be an official resident of the county auditor's office.

A fact fixed, in the nature of things can not be changed by decision. The law says that a man who resides in one county does not reside in another county; that a man

who is a non-resident of the state is not a resident of any county in the state; and this is so in the nature of things, and this must be and is most emphatically true for the purposes of a special statutory proceeding such as is here under consideration.

It can not be fairly claimed that an executor is in any way under the jurisdiction of the auditor of the county with respect to the estate being administered or for any other purpose. Whatever means might exist for bringing him into the circuit court with respect to various proceedings there, he can not be required to appear before the auditor, unless there is some statute making such requirement lawful.

As abundantly established, the fact that such an executor is before the auditor, objecting and protesting to his jurisdiction, has nothing to do with our inquiry. The proceeding is unauthorized, unless there is a law by which he can be lawfully summoned to be present before the auditor in the character of a defendant to the proceeding.

As to non-residents of the county, as plainly appears by reading the statute here under consideration, there is no such provision.

We repeat, the question is not whether he was in the circuit court, but whether he was present or could be brought before the *auditor* without a notice provided for by statute.

Much confusion has resulted in this case by failing to keep in mind that the question as to section 8560 is a question of the assessment, not of the collection of this tax; that the question is as to the jurisdiction of the auditor, and not of the court.

And this confusion has been increased by failing to note that section 8560 is not confined to fiduciaries, but applies equally to all tax-payers. Any tax-payer, whether a fiduciary or not, wherever resident, is sought to be cov-

ered by this section, but notice is provided only for a resident of the particular county whose auditor takes the proceeding.

Yet everybody knows that a tax-payer may have personal property subject to assessment in many different counties at the same time.

Burns, section 8421. Subsections 1, 2, 3, 4.

This is equally true as to property of decedent non-residents of the state, and of a trustee or agent or the owner of property.

Ibid, subsections 6, 7 and 8.

No one will claim that a proceeding under 8560 can be before any auditor except of the county where the property is assessable.

That being so, it follows, according to the logic of the opinion in this case, that a tax-payer is bound to appear, without any provision for notice, before the auditor of any county who calls in question the correctness of his assessment; that is, for the purpose of a proceeding under section 8560 such tax-payer is to be deemed a resident of every county in which he has a cow, a share in a local bank or a lumber pile subject to taxation.

And he must appear before the auditor without notice, unless he resides in the county, for a notice not provided by law is not notice.

Kuntz v. *Sumption*, 117 Ind. 1.

It is submitted that this is not only contrary to all principle, but the legislature in this very section, by providing for notice to a resident, shows that it takes no stock in any such contention. If notice is unnecessary for non-residents of the county, it is equally unnecessary for residents of the county. And if a non-resident is to be deemed for the purposes of this extraordinary assess-

ment present in the auditor's office without notice, much more might such an assumption obtain with reference to a resident of the county.

Not only does the legislature, by providing for notice to residents, stamp with its disapproval this contention, but also providing for the issue and service of a notice to show cause in the proceeding under section 8587 shows that it does not sanction or recognize that an executor or other fiduciary is in court, even though it may be where his estate is pending, without notice. That statute, 8587, provides for issuing an order directed to the fiduciary commanding him to show cause within five days, etc. Will it be contended by this court, or by any one else, that, without service of that order to show cause, the circuit court or any other court could go on and take the subsequent proceedings provided for in that section against a non-resident executor? Would not such proceedings, taken in the absence of showing such service or the voluntary appearance of the respondent, be absolutely void? If so, and if a proceeding of this kind can not be taken against an executor even in the circuit court without provision for notice, how is it to be maintained that the auditor may get jurisdiction and carry forward such a proceeding without any provision for notice whatever?

But not only does this particular section 8587 discountenance the idea that such a proceeding can be had without statutory notice, but numerous provisions of the statutes of Indiana show that the contention that an executor who is a non-resident of the state is to be deemed a resident of the county is untenable.

The record shows beyond controversy that the executor was a resident of the state of New Hampshire.

Section 2402, Burns' Revised Statutes (touching the removal of executors), says, in words as plain as the English language furnishes, that an executor living in

another state is not officially present *even in the court* where the estate is pending, but must be brought in by publication.

The language is:

"If such executor be not a resident of the state, notice of the filing of such application shall be given three weeks successively in some newspaper published in the county where such application is filed, or if none be printed therein, then in some newspaper printed in this state nearest thereto."

If a resident in the county, why the necessity for this publication?

So section 2401, Burns' Revised Statutes, requires an executor resident in the state to be brought in by citation. If he is always present in court, why the citation?

The truth is, the legislature has said as plainly as language can say that an executor who lives out of the state is not a resident of Indiana, official or otherwise. The supreme court of Indiana, for the purpose of sustaining this tax, says that he is. That court might just as well have said that a citizen is an alien or an alien a citizen, that New Hampshire is Indiana, that Allen county is Marion county, that white is black, or that night is day.

Mark, this is not the construction of a state statute. We have no statute defining what shall constitute a resident of Indiana. The legislature has never attempted by enactment to make equal things which in their nature are unequal, to say that a straight line is not the shortest distance between two points, that parallel lines if prolonged will meet, or in any way to do or to sanction by legislation what is here attempted to be done by the court.

If the executor were officially present in the circuit court, would it follow that he is present in the superior court (which would also have jurisdiction to make this

collection, section 8587), or a resident of the county with respect to a proceeding such as this by the *auditor?* Even if "officially present" in the circuit court as executor, is he also "officially present" in the auditor's office?

The statute under which this proceeding was brought in court (section 8587) applies to all fiduciaries, executors, administrators, guardians, receivers and trustees. We suppose it applies as well to trustees not appointed by the court as to such as are appointed by courts. Would such tax-payers be official residents of the county and present in court or auditor's office?

The property of minors under guardianship must be assessed where the guardian resides.

Section 8421, Par. 5, Burns' Revised Statutes.

Suppose the guardian resides in Hendricks county and the guardianship proceedings are pending in Marion county. The assessment in such a case must be in Hendricks county. Then the proceeding under 8560 must be before the auditor of Hendricks county. Must the proceeding under section 8587 be in Marion county, and, if so, is the guardian an official resident of Marion county, or Hendricks county, or both counties? He must be officially taxed where his residence is. But his residence is in Hendricks county. Would his official taxation in Hendricks county, where he resides, be consistent with his official residence in Marion county, where the guardianship is pending?

The property of other persons under guardianship is to be taxed where the ward lives. *Ibid.*

Property in the hands of an executor or administrator is to be assessed in the county where the deceased last dwelt.

Section 8421, Par. 6, Burns' Revised Statutes.

Property in the hands of a trustee or agent is to be assessed where the trustee or agent resides, except as "otherwise by law provided."

Section 8421, Par. 7, Burns' Revised Statutes.

We suppose as to chattels having a local situs it is "otherwise provided" in subsections 1, 2, 3 and 4.

It will be noticed that the word "resides" is the one employed in all these provisions, and is the same word used in 8560 providing for this assessment.

If these statutes mean anything, they clearly show that a fiduciary, under section 8560, may or may not reside in the county where the trust is in court, if it is in court at all. But as to agents and trustees, it is entirely clear that they need have no relation to any court.

One may also be an executor of several estates in different counties at the same time and not reside in either one of those counties, but may reside out of the state. Is he an official resident of each county, and on that account required without any statutory provision for notice to appear before the auditor of each in a proceeding like this?

Wright v. *Wright*, 72 Ind. 149.

Nay, more; as above stated, one as executor, or as agent or trustee, may have *in the same estate* property taxable in one, two or a dozen different counties, as, for instance, if there is farm stock or merchandise locally taxable in several counties, according to the opinion in this case, the executor, or agent, is an "official resident" of every county where he has any chattel property, and is liable to be called before the auditor of each county under 8560 without any statute providing for notice.

The difficulties necessarily arising from such a ruling as the one announced in the opinion in this case, both with respect to correct reasoning and the orderly administration of the law, appear to us insurmountable.

IV.

Official Residence Without Support in Statutes.

But this assumption that the executor was to be treated as an official resident of Marion county, Indiana, for the purpose of taxation has as little support in statute or in precedent as in principle.

In the first place, as we have seen, the legislature of Indiana has expressly provided for non-resident executors, and has expressly provided the steps necessary to be taken, by way of publication and otherwise, for the purpose of getting them into the very court in which their trust is pending.

An executor is not required to be a resident of the state or county.

Burns' Revised Statutes 1894, section 2375.

Nor is an administrator with the will annexed.

Burns' Revised Statutes 1894, section 2379.

Nor an ordinary administrator.

Burns' Revised Statutes 1894, section 2380.

The only case in which an ordinary administrator is required to be a resident of the state or county is when a widow or widower or next of kin does not apply.

Burns' Revised Statutes 1894, section 2380.

An executor appointed in a foreign state may be appointed.

Burns' Revised Statutes 1894, section 2384.

Suppose an executor is appointed in Franklin county, Ohio, and then comes and is appointed in Marion county, Indiana. Is he thenceforward to be treated as a resident of Marion county?

Section 2400 provides for the removal of a non-resident executor or administrator, and section 2402 reads as follows:

"If such executor be a non-resident of the state, notice of the filing of such application (for removal) shall be given three weeks successively in some newspaper published in the county where such application is filed, or if none be printed therein, then in some newspaper printed in this state nearest thereto."

Section 2400 provides what course shall be pursued in case an executor shall remove from the state. Suppose Edward P. Gallup, Executor, is a necessary party to a suit to quiet title or to foreclose a mortgage in the Marion circuit court. Is he to be brought in as a resident or as a non-resident of Marion county and of the state of Indiana? Surely no court would hold that without being brought into court by summons, or by publication, or in some way, a judgment could be rendered against him as such executor.

If the legislature had regarded a non-resident executor as an official resident of the county, even for court purposes, would the foregoing statutes have been enacted? The statement of the proposition is its own refutation.

However, it must be kept continually in mind that the question here is not how the executor can be got into *court* to answer the treasurer's claim under section 8587, but whether he is always present in the *auditor's* office to meet an extraordinary assessment for taxation under section 8560.

As before stated, this statute providing for assessments of omitted property applies to all tax-payers. And it applies equally to corporations as to individuals. Of course, it applies as well to corporations organized under the laws of New York or Ohio or New Jersey as to In-

diana corporations. But if a foreign corporation is the owner of property, as, for instance, the Standard Oil Company, in each of forty different counties in the state, or if a foreign corporation is the trustee or agent of property in each of forty different counties in the state of Indiana, is such foreign corporation to be held an official resident of each of said counties, notwithstanding the rule that a corporation can not migrate or have a legal residence outside of the state of its creation?

V.

Official Residence at Variance with Decisions of Courts.

An examination of the books will show that in the decisions of the courts no sanction can be found for this legal fiction of official residence. Counsel for defendant in error in the court below found nothing of the kind, nor did the court. Its existence was baldly assumed, as we think, without the support either of reason or authority.

It is impossible to find authorities directly upon this exact question, because we do not suppose that such a contention has ever before been made in court.

1. *Residence for Jurisdictional Purposes.*

Of course, nothing is better settled than that for the purposes of jurisdiction in the federal courts it is the actual residence and citizenship of the man, not of the official, that is decisive. Thus, if the suit be by an executor, an administrator, a receiver, a trustee, or in any other representative capacity, the citizenship of the person, not of the official, decides the jurisdiction.

Thus, in *Amory* v. *Amory*, 95 U. S. 186, the petition for the removal of the cause to the federal court alleged that "such plaintiffs as executors are citizens of the state of New York." The court said:

"Where the jurisdiction of the courts of the United States depends upon the citizenship of the parties, it has reference to the parties as persons. A petition for removal must, therefore, state the personal citizenship of the parties, and not their official citizenship, *if there can be such a thing.*"

So it is held that a citizen and resident of Tennessee taking out letters of administration in that state on the estate of a decedent resident and citizen of Tennessee, and afterward removing to Kentucky and becoming a citizen and resident there, may sue as executor in the United States circuit court in Tennessee, there being no law of Tennessee forbidding an administrator to remove from the state.

Rice v. *Houston,* 13 Wall. 66.

So in *Davies* v. *Lathrop,* 12 Federal Reporter 353, an action for damages caused by negligence brought against a receiver of a corporation in a state court of New York, had been removed into the circuit court for that district, on the ground that the receiver was a citizen of New Jersey. A motion was made to remand on the ground that, being an officer appointed by a New York court, the receiver was an official resident and citizen of New York. Judge Blatchford says:

"The defendant, while an officer of the New York court and sued as such, was a citizen of New Jersey. He was a representative as much as the executor or a trustee is. In fact, he was a trustee. The personal citizenship of the executor or trustee is what is regarded. *Rice* v. *Houston,* 13 Wall. 66; *Knapp* v. *Railroad Co.,* 20 Wall. 117, 123."

When the suit is by the obligee of a bond, who is a mere naked trustee without interest, as on a marshal's

bond or sheriff's bond, the citizenship of the beneficiaries, the real parties in interest, is the test.

Coal Company v. *Blatchford,* 11 Wall. 172.
McNutt v. *Bland,* 2 How. 9.
Browne v. *Strode,* 5 Cranch 303.

In case of an executor or administrator, on the other hand, he has the title to the property, and no one else can sue.

Dodd v. *Ghiselin,* 27 Fed. Rep. 405.
Lamar v. *Micou,* 112 U. S. 452.

And the same rule applies where the administrator sues only for the benefit of the widow and next of kin, where the administrator and the defendant are citizens of different states, although the deceased was a citizen of the same state with the defendant, where his widow and children still reside.

Harper v. *Norfolk,* 36 Fed. Rep. 103.

And this rule prevails where a non-resident administrator is appointed for the very purpose of giving the federal court jurisdiction.

Goff's Admr. v. *Norfolk,* 36 Fed. Rep. 299.

Where a non-resident has been appointed administrator in Louisiana, a citizen of Louisiana may sue him in the federal court in that state on the ground of diverse citizenship.

Semmes v. *Whitney,* 50 Fed. Rep. 666.
New Orleans, etc., v. *Gaines, Admr.,* 138 U. S. 595, 600.

Indeed, the legislature of Indiana has distinctly recognized that residence is not affected by a court appointment to a trusteeship by attempting to forbid such appointment.

Shirk v. *City of Lafayette,* 52 Fed. Rep. 857.

It is the residence of the trustee—that is, of the person—that determines in what city or county taxes shall be levied on personal property.

Wade v. *Sewall*, 56 Fed. Rep. 129, 131.

Latrobe v. *City of Baltimore*, 19 Md. 13.

In *Blake* v. *McClung*, 172 U. S. 239, and 176 U. S. 59, this court held that it was not competent for the legislature of a state, by statute, to discriminate against non-residents of the state in the distribution of the assets of an insolvent corporation, because to do so would be to deny to the non-resident the equal protection of the laws.

Suppose that one of those non-resident suitors had been the executor of the last will and testament of a decedent resident of Tennessee, the excutor being a resident, we will say, of Kentucky. Is it possible that a different rule would have been applied as to him by reason of that fact? As above shown, he would have the title to the property, and the absolute right of action would have been in him. And would it have been any answer to his assertion that he was made the subject of unlawful discrimination, that he was an official resident of Tennessee?

Or, take the case of *Dewey* v. *Des Moines*, 173 U. S. 201, where it was attempted to take a personal judgment against a non-resident for the balance of a special assessment against his property. Suppose that non-resident had been an executor to whom the title to the property had been conveyed for administration. Could a judgment have been taken against him or his estate without the service of process, without giving notice, upon the ground that he had an official residence in Polk county, Iowa?

If the legislature of Indiana had made non-residence

a disqualification, or had required that only a resident should be appointed executor or administrator, and had not repeatedly sanctioned by statute the appointment and service of foreign executors and administrators, there would be more plausibility in the contention in this case.

Indeed, the supreme court of Indiana has recognized the fact that one who takes letters of administration or executorship from an Indiana court does not by that fact change his non-residence.

Ewing v. *Ewing*, 38 Ind. 390.

Non-residence is not a disqualification for appointment as executor, nor was even alienage at common law.

11 Am. & Eng. Encyc. of Law (2 ed.), 753.

Alienage is only a statutory disqualification.

Cutler v. *Howard*, 9 Wis. 309.

In re Connor, 16 Montana 465; 41 Pac. 271.

Statutes providing for the removal of an executor who leaves the state do not prevent the appointment of a non-resident.

Corrigan v. *Jones*, 14 Col. 311; 23 Pac. 913.

So a statute providing that if a non-resident is named as executor, an administrator, if there is no other executor, shall be appointed, does not disqualify the original executor.

In re Brown, 80 Cal. 381; 22 Pac. 233.

By the judiciary act of 1888, Sup. to the Revised Statutes, page 612, no suit can be brought against any person in any other district than that whereof he is an inhabitant or whereof the plaintiff is an inhabitant. Under that statute, could Edward P. Gallup, executor, be sued in the United States circuit court for Indiana by a citizen and inhabitant of Ohio? Gallup, the man, is a resident

or inhabitant of New Hampshire. Gallup, the executor, according to this decision, would be an official resident of Indiana. Would the official residence enable the Ohio plaintiff to maintain such action against Gallup's consent?

2. *Residence as to Security for Costs.*

The same proposition, that it is the residence of the person and not of the officer that constitutes the test, is maintained in a large number of adjudications upon statutes requiring undertakings for costs.

In all cases it seems to be the rule that where an executor or administrator is a non-resident, security for costs may be required.

19 Am. & Eng. Encyc. Pleading & Practice 350.

In King's Estate, 9 Weekly Notes of Cases 207, Orphan's Court, it was held that the executor named in the will, a resident and citizen of Massachusetts, must file security for costs.

In the same state it was held that where, after commencing the suit, the executrix removed out of the state, she was bound to give security for costs.

Buck v. *James*, 2 Chester County Reports 401.

So, in Alabama the fact that a non-resident has been appointed administrator by an Alabama court does not relieve him from the requirement that as a non-resident he must give security for costs.

Davis v. *You*, 43 Ala. 691.

So, where a resident administrator had brought his action in the Alabama court and afterward moved out of the state, it was held that, notwithstanding he was still

suing as administrator appointed by an Alabama court, he must give security for costs.

Ex parte Louisville and Nashville R. R., 27 So. 239.

Where an executor lives out of the jurisdiction of the court, he must give security for costs. It does not appear in this case where the executor was appointed, but the inference is it was a domestic appointment.

Chevalier v. *Finnis*, 1 Brod. & Bing. 277. 5 E. C. L. 82.

The same doctrine is laid down and enforced in *Cathcart* v. *Hewson*, Hayes Exch. 173, notes on page 173 and 174. In this case the complainant died and the domestic executor, a non-resident, was substituted, and he was required to give the security.

To the same effect is *Chamberlain's Executor* v. *Chamberlain*, 1 Dowl. Practice Cases 366.

Under the New York statute requiring that a non-resident plaintiff give security for costs, a non-resident who has been appointed administrator by the surrogate of New York county on an estate situated in New York county must give security.

Podmore v. *Seaman*, 57 N. Y. S. 829.
Tracy v. *Dolan*, 52 N. Y. S. 351.

The New York Code of Civil Procedure, section 3268, provides that a defendant may require security for costs whenever, in an action brought in a county court, the plaintiff is a person residing without the county wherein the court is located. Sheerin Special Agency was a corporation of New York having its office and principal place of business in New York county. It brought an action against one Seaman in Westchester county. Seaman moved under the statute for security for costs, be-

cause the corporation was a non-resident of Westchester county. It was claimed on the other hand that the corporation, although its principal office was in New York county, was a resident of every county of the state where it did business. Held otherwise, and that the corporation was rightly required to give security for costs.

Sherin Special Agency v. *Seaman*, 63 N. Y. S. 407.

Would anybody suppose that if this New York corporation had been a trust company, for instance, and as such appointed as an executor or administrator or guardian, that a different rule would have been applied to it, and that it would have been held to be a resident of every county in which it might do business? It seems to us, without further extending this argument, that this doctrine of official residence is, as before stated, a pure fiction, altogether unnecessary and mischievous in the just administration of the law, and that it can not be carried into practical effect without leading to difficulties innumerable.

VI.

The following is a summary of our points and authorities:

I.

The statute, section 8560, is in conflict with the fourteenth amendment to the constitution, because it provides for a change in the assessment of property as made under the general law, without providing any notice to the property-owner.

1. This statute provides for no such notice.

Buck v. *Miller*, 147 Ind. 597.

The manner of assessment must be prescribed by the statute.

State Board v. *Holliday*, 150 Ind. 216.
Sears v. *Street Commissioners of Boston*, 53 N. E. 876.
Charles v. *City of Marion*, 98 Fed. Rep. 166, 168.
Cooley Taxation 244.

The notice must be prescribed by law, and notice not prescribed by law is no notice.

Kuntz v. *Sumption*, 117 Ind. 1.
Stuart v. *Palmer*, 74 N. Y. 183.
Violet's Heirs v. *City Council of Alexandria*, 23 S. E. Rep. 909.
Walsh, Treasurer, v. *The State*, 142 Ind. 363.
Tucker v. *Sellers*, 130 Ind. 514.
Scudder v. *Jones*, 134 Ind. 547.
Terre Haute, etc., Co. v. *Baker*, 122 Ind., at page 441.
Norvell v. *Porter*, 62 Mo. 309.
Osborne v. *Shutt*, 67 Mo. 712.
Harmon v. *Birchard*, 8 Blackf. 418.
Eaton, Treas., v. *Union County National Bank*, 141 Ind. 159.
English v. *The Mayor*, 37 Atl. 158, 162.
Hood River v. *Wasco County*, 57 Pac. Rep. 1017.
Minneapolis v. *McGillivray*, 104 Fed. Rep. 258, 269.
Roller v. *Holley*, 176 U. S. 398, 408, 409.

No tax can be upheld if not within the letter of the statute, although it is within the spirit thereof.

American Net and Twine Co. v. *Worthington*, 141 U. S. 468, 474.

Parker v. *Overman*, 18 How. 137.
M'Clung v. *Ross*, 5 Wheat. 116.
Commercial Bank v. *Sanford*, 103 Fed. Rep. 98.
Williams v. *Peyton's Lessee*, 4 Wheat. 77.
Davis v. *The Board*, 67 N. W. 997.
Hagner v. *Hall*, 42 N. Y. S. 63.
Davidson v. *New Orleans*, 96 U. S. 97.
Fallbrook Irrigation District v. *Bradley*, 164 U. S., at page 157.
Bauman v. *Ross*, 167 U. S. 548.
Savanah v. *City* (Ga.), 23 S. E. 847.

Even the killing of a dog for police purposes can not be justified except upon notice.

People v. *Tighe*, 30 N. Y. S. 368.
Loesch v. *Koehler*, 144 Ind. 278.

2. In all cases where an assessment without notice has been upheld, it has been by reason of the fact that the collector or treasurer was *compelled* to collect by a suit in court where the tax-payer could have an opportunity to be heard.

Hagar v. *Reclamation District*, 111 U. S. 701-711.
Walston v. *Nevin*, 128 U. S. 578.
State v. *Weyerhauser*, 75 N. W. 718.
In re Taxes for Itasca County, 71 N. W. 265.
State v. *Certain Lands*, 42 N. W. 473.
Winona, etc., v. *Minnesota*, 159 U. S. 526.

But in the case at bar the provision for collection by suit in court is merely cumulative. The statute, section 8589, expressly provides that the collection may be by distress and sale at the option of the treasurer. In such

case the law is invalid, since it gives a hearing only by the favor of the treasurer, not as of right.

Scott v. *City of Toledo*, 36 Fed. Rep. 385.
Meyers v. *Shields*, 61 Fed. Rep. 713.

3. The statements in the opinion of the supreme court of Indiana, on pages 39 and 40, to the effect that plaintiff in error is not aggrieved, because he was in a position to assert all his rights and because he could have attacked the assessment by injunction, are wholly unwarranted.

(*a*) He was aggrieved because he was called before the auditor for a hearing without any valid provision of law therefor. The law providing for no notice to him, he had no notice. To hold that because he had notice in fact, was subpœnaed and appeared and testified under protest, he was not aggrieved, is directly in the teeth of—

Kuntz v. *Sumption*, 117 Ind. 1.
Eaton, Treasurer, v. *Union County National Bank*, 141 Ind. 159.

(*b*) The contention that an assessment which might be held void in a suit to enforce the tax in a collateral suit, on an application for an injunction, can not be assailed in a direct proceeding to collect needs no discussion. Exactly the reverse is the rule.

(*c*) And the proposition that because the state is entitled to enforce taxes against non-residents as well as residents, against all property within its borders, therefore, when it attempts to do so in the absence of statutes providing for notice and making due process of law, any resistance is unwarranted, is equally untenable, as has been recognized by the legislature of Indiana and by the supreme court.

(*d*) If the law is inadequate, the tax can not be enforced, and the remedy must be applied by the legislature, and not by the courts.

Thus when the supreme court declared the assessment void in *Kuntz* v. *Sumption, supra,* the legislature amended the act and provided for notice.

Walsh v. *Treasurer,* 142 Ind., on page 363.

(*c*) The proposition in the part of the opinion under review, that the executor is in court for the purpose of meeting claims against the estate at all times, it is submitted, is not borne out by the decisions of the supreme court of Indiana. On the contrary, *Scott* v. *Dailey,* 89 Ind. 477, holds that he is not there, or bound to answer, except when he has been brought in in due form of law and after the lapse of the time prescribed, and that, until then, the court got no jurisdiction.

In the case at bar, on the contrary, he is required to answer without any compliance by the plaintiff with either the conditions or the time for a hearing. The suit is commenced the very day after the assessment, instead of at the next term of the court; and the judgment goes against the defendant, although it is shown that he has not moneys on hand with which to pay the debt.

But, as elsewhere shown, the main question here is not whether the executor is to be deemed present in court, but whether he is to be deemed present in the auditor's office for a hearing before the auditor.

II.

The statute, section 8560, invalid as class legislation and denial of equal privileges and immunities.

Section 2, article 4, constitution of the United States.

Section 1, fourteenth amendment to constitution of United States.

The statute, as above shown, denies to citizens of other states owning property in Indiana a privilege and immunity granted to a citizen of the state resident in the county, that is, notice.

State v. *Board,* 20 South. 772.
Paul v. *Virginia,* 8 Wall. 168.
Sprague v. *Fletcher,* 37 Atl. 239.
O'Connell v. *Menominee,* 71 N. W. 449.
Corfield v. *Coryell,* 4 Wash. C. C. 380.
Blake v. *McClung,* 172 U. S. 239.

III.

The supreme court of Indiana concedes that notice for the making of such an assessment is essential, and that unless this statute provides for notice, it is invalid. But it attempts to escape the effect of this principle of the law by setting up the legal fiction of an "official residence." This is an original discovery. It is supported by no authorities either in the briefs of counsel or opinion of the court.

A fact fixed in the nature of things can not be changed by decision. A non-resident is not a resident.

Question not of jurisdiction of the court, but of jurisdiction of the auditor; not of authority of court to proceed without notice, but of auditor to proceed without notice.

Tax-payer may have personal property subject to assessment in every county of the state.

Burns, section 8421; subsections 1, 2, 3, 4, 6, 7, 8.

Is an executor representing such tax-payer bound to appear without notice in the auditor's office of every county in the state?

This is not the construction of a state statute. There is no statute defining residence.

Statutes of Indiana require notice to non-resident executors or administrators.

Sections 2401, 2402.

Statutes in relation to guardians show that "official residence" would lead to inextricable difficulties.

Section 8421, par. 5, 6, 7.

Wright v. *Wright*, 72 Ind. 149.

IV.

This doctrine of official residence has no support in statute or decision.

The statutes recognize that all fiduciaries, executors, administrators, guardians and trustees may be non-residents.

R. S. Burns, sections 2375, 2379, 2380, 2384, 2400, 2402, 2451, 2452, 2453, 2673, 2703, 2705, 2706.

Neither a non-resident executor, administrator or guardian, or any other fiduciary, can be removed except upon statutory notice, by publication or otherwise, as is clearly shown by the above citations from the statutes.

Would such provision have been made for notice to non-residents if they were regarded as "official residents?"

So as to foreign corporations. Foreign corporations hold property in the state, yet they are non-residents. Indeed, it is held that a corporation can not change its residence. Would a foreign corporation having property in Indiana subject to be assessed under this statute be an "official resident?"

V.

No authority has been found by court or counsel supporting this fiction of official residence.

1. As to jurisdiction of federal courts.

It is the residence of the man, and not the place of appointment of the officer, that gives jurisdiction.

Amory v. *Amory*, 95 U. S. 186.
Rice v. *Houston*, 13 Wall. 66.
Davies v. *Lathrop*, 12 Fed. Rep. 353.

Where the suit is by the obligee of a bond who is a mere naked trustee, as a marshal's or sheriff's bond, the citizenship of the beneficiaries, the real parties in interest, is the test.

Coal Company v. *Blatchford*, 11 Wal. 172.
McNutt v. *Bland*, 2 How. 9.
Brown v. *Strode*, 5 Cranch 303.

In case of an executor or administrator, on the other hand, he has the title to the property, and no one else can sue, and his personal residence determines jurisdiction.

Dodd v. *Ghiselin*, 27 Fed. Rep. 405.
Lamar v. *Micou*, 112 U. S. 452.
Harper v. *Norfolk*, 36 Fed. Rep. 103.
Goff's Administrator v. *Norfolk*, 36 Fed. Rep. 299.
Semmes v. *Whitney*, 50 Fed. Rep. 666.
New Orleans v. *Gaines, Admr.*, 138 U. S. 595.

The legislature of Indiana has recognized that residence is not affected by court appointment to a trusteeship by attempting to forbid such appointment.

Shirk v. *City of Lafayette*, 52 Fed. Rep. 857.

The same doctrine that the residence of the person is the test prevails everywhere.

Wade v. *Sewall*, 56 Fed. Rep. 129.
Latrobe v. *City*, 19 Md. 13.
Blake v. *McClung*, 172 U. S. 239.
Blake v. *McClung*, 176 U. S. 59.
Dewey v. *Des Moines*, 173 U. S. 201.

The supreme court of Indiana has recognized that appointment as executor by an Indiana court does not change the fact of appointee's non-residence.

Ewing v. *Ewing*, 38 Ind. 390.

Nor should it, since non-residence is not a disqualification for appointment as executor or administrator, nor was even alienage at common law.

11 A. & E. Ency. of Law 753 (2 ed.).
Cutler v. *Howard*, 9 Wis. 309.
In re Connor, 16 Mon. 465; 41 Pac. Rep. 271.
Corrigan v. *Jones*, 14 Col. 311; 23 Pac. 913.
In re Brown, 80 Cal. 381; 22 Pac. 233.

2. The same rule is illustrated and enforced as to security for costs required of non-residents. It is the residence of the person, not of the officer, executor, receiver or other fiduciary, that controls.

19 A. & E. Ency. Pleading & Practice 350.
King's Estate, 9 Weekly Notes of Cases 207.
Buck v. *James*, 2 Chester County Reports 401.
Davis v. *You*, 43 Ala. 691.
Ex parte Louisville and Nashville Railroad, 27 So. 239.
Chevalier v. *Finnis*, 1 Brod. & Bing. 277, 5 E. C. L. 82.

Cathcart v. *Hewson*, Hayes Exch. 173 and notes.

Chamberlain's Executor v. *Chamberlain*, 1 Dowl. Pr. Cas. 366.

Podmore v. *Seaman*, 57 N. Y. S. 829.

Tracy v. *Dolan*, 52 N. Y. S. 351.

Sherin Special Agency v. *Seaman*, 63 N. Y. S. 407.

We submit for the foregoing reasons this judgment should be reversed.

The claim that taxes are due from this estate may or may not be true. We have no knowledge on that subject except what we get from the record.

We do know that if such be the fact, it furnishes no excuse for attempting to collect them without law or in violation of law. If taxes are justly due, a way can be found to collect them without violating fundamental principles, and inventing fictions which "will return to plague the inventor" and all others concerned in the future administration of the law.

Respectfully submitted,

W. H. H. MILLER,
JOHN B. ELAM,
JAMES W. FESLER,
SAMUEL D. MILLER,
Attorneys for Plaintiff in Error.

WAYNE MACVEAGH, *of Counsel.*